No. 80-327

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IN THE

Supreme Court of the United States

October Term, 1980

VALLEY FORGE CHRISTIAN COLLEGE,

Petitioner,

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, NEW YORK COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY and FLORENCE FLAST, AMICI CURIAE

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The Interest of the Amici

This brief is submitted in behalf of the National Coalition for Public Education and Religious Liberty (National PEARL), the New York Committee for Public Education

and Religious Liberty (New York PEARL) and Florence Flast.

National PEARL is a coalition of national organizations, sharing the common objectives of preserving religious freedom and the separation of church and state in the arena of education.[1]

New York PEARL, the predecessor and now a constituent of National PEARL, is organized for the same purpose. It has acted as a co-plaintiff in a number of suits involving the establishment and free exercise clauses in the educational arena.[2]

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1. The constituents of National PEARL are: American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference, American Ethical Union; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

Americans United for Separation of Church and State is a respondent in this case and is submitting its own brief in that capacity. We have been informed by the American Jewish Congress that it will submit its own brief amicus herein.

2. The constituents of New York PEARL are: American Ethical Union; Americans for Democratic Action; Americans for Public Schools; American Jewish Committee, New York Chapter; American Jewish Congress; A. Philip Randolph Institute; Association of Reform Rabbis of New York City and Vicinity; B'nai B'rith; Bronx

(footnote continued on next page)

Florence Flast is a citizen and a taxpayer in the United States of America. She is a vice-president of National PEARL and chairman of New York PEARL. In her individual capacity she was the lead plaintiff in the case of *Flast* v. *Cohen*, 392 U.S. 83 (1968), which established that the courts will not readily sanction a grave impairment of the First Amendment's Establishment Clause predicated upon a claim of immunity from judicial review.

The amici herein are committed to the integrity of that Clause. They are committed no less to the meaningful survival of the American public school system, which, together with the principle of church-state separation, are the nation's most significant contributions to contemporary civilization. Because they believe that the integrity and meaningful survival of both would be endangered were the courts to be held impotent to accord appropriate relief in the situation presented in the instant case, they have joined in respectfully submitting the within brief for this Court's consideration.

Park Community; Citizens Union of the City of New York; City Club of New York; Community Church of New York; Community Service Society, Department of Public Affairs; Council of Churches of the City of New York; Episcopal Diocese of L. I., Department of Christian Social Relations; Humanist Society of Greater New York; Jewish Reconstructionist Foundation; Jewish War Veterans, New York Department; League for Industrial Democracy, New York City Chapter; National Council of Jewish Women; National Women's Conference of The American Ethical Union; New York Civil Liberties Union; New York Federation of Reform Synagogues; New York Jewish Labor Committee; New York Society for Ethical Culture; New York State Americans United for Separation of Church and State; New York State Council of Churches; State Congress of Parents and Teachers, New York City District; Union of American Hebrew Congregations, New York State Council; Unitarian-Universalist Ministers Association of Metropolitan New York; United Community Centers; United Federation of Teachers; United Parents Association; United Synagogue of America, New York Metropolitan Region; Women's City Club of New York; Workmen's Circle, New York Division.

Statement of the Case

The complaint in this case alleges that the United States had conveyed 77 acres of land and buildings to the Valley Forge Christian College, that the college was basically a religious institution, that religion pervades its instruction, and that the grant therefore violated the Establishment Clause of the First Amendment. The complaint sought judgment declaring the grant to be void and ordering return of the property to the United States Government.

On motion of the defendants, the district court dismissed the complaint on the ground that plaintiffs lacked standing to sue under *Flast* v. *Cohen*, 392 U.S. 83 (1968), in that the challenge was to a transaction of property under Article IV, Section 3, Clause 2, of the Constitution and not to an exercise of Congress' power to tax and spend.

The court of appeals reversed on the ground that while plaintiffs lacked standing in their capacity as taxpayers, they could sue in their capacity as citizens seeking to redress their rights under the Establishment Clause of the First Amendment.

Thereafter, this Court granted certiorari to review the decision of the court of appeals.

Question to Which This Brief Is Addressed

The single question considered in this brief is whether a patently unconstitutional grant of governmental property to a church for religious use is immune from judicial review by reason of a claimed lack of standing on the part of the plaintiffs in the suit.

Summary of Argument

The unconstitutionality of the governmental action challenged herein is hardly open to question. As a practical and realistic matter unavailability of a suit by citizens and taxpayers would to that extent make a mockery of the declaration in Article VI that the Constitution is the Supreme Law of the land.

Prior decisions of this Court do not mandate such a result. On the contrary, denial of standing on the part of the appellees herein could well negate the Court's decisions ruling unconstitutional governmental grants of funds to religious institutions simply by making the grant in the form not of money but of property easily convertible into money.

This Court need not and should not construe Article III of the Constitution as precluding the courts' jurisdiction of suits by citizen-taxpayers aimed at flagrant violations of at least the spending power under Article I, Section 8. But irrespective of this, the court of appeals was correct in holding that "the Establishment Clause does create in every citizen a personal constitutional right, such that any citizen, including taxpayers, may contest under that clause the constitutionality of federal expenditures."[3]

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3. Americans United for Separation of Church and State v. United States Department of Health, Education and Welfare, 617 F. 2d 252 (3d Cir. 1980).

ARGUMENT

1. The Constitutional Question

We recognize that the issue presented to the Court at this stage of the litigation is one of jurisdiction rather than the substantive merits of the underlying lawsuit. We suggest, however, for reasons to appear shortly, that a brief consideration of the constitutional issue is pertinent at this point.

There is, we submit, little doubt that the government's gift to the Valley Forge Christian College of property exceeding a million dollars in value cannot be reconciled with the mandate of the First Amendment's Establishment Clause. No better authority for this proposition can be expected than the author of the Clause, James Madison. Madison, as President, vetoed a bill giving certain land to a Baptist Church, stating as his reason therefor, that

> . . . the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."[4]

(It should be noted that in respect to the substantive issue, Madison used the term "parcel of land" and "funds" interchangeably.)

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4. J. Richardson, Messages and Papers of the Presidents (1900) I, p. 490.

Nor is there any doubt that Madison assumed accessibility to the courts to remedy such a violation of the Constitution. If a bill of rights, he had said, were

> . . . incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an inpenetrable bulwark against any assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[5]

Nothing in the many decisions of the Court involving aid to religious educational institutions indicates any inkling of or intent to distinguish between grants of money and grants of land. Were the contested transaction in this case an appropriation of money rather than of real property, there could be little question as to its unconstitutionality. Certainly it would be action in aid of religion within the prohibition of the Establishment Clause as construed in *Everson* v. *Board of Education,* 330 U.S. 1 (1947). Nor could it survive a challenge to invalidation under the purpose-effect-entanglement test announced in *Walz* v. *Tax Commission,* 397 U.S. 604 (1970) and applied in its numerous progeny beginning with *Lemon* v. *Kurtzman,* 403 U.S. 602 (1977).[6]

In the first place, its purpose is obviously to advance religion. While the Court has indicated a reluctance to

5. Annals of Congress, Vol. I, 1st Cong., 1st and 2nd Sess. p. 439; quoted in C. Hughes, The Supreme Court of the United States (1927) p. 160.

6. See, Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

find impermissible purpose in cases challenging grants to church related educational institutions,[7] it is difficult to find any other purpose in respect to the grant here in issue. The College can hardly claim that it has any major purpose other than the advancement of the Christian religion. Indeed, it makes that fact abundantly clear to its students and prospective students.[8] The suit herein does not challenge the constitutionality of the underlying surplus property statute.[9] It challenges only the specific gift made to the College, action having no purpose other than the advancement of religion, thus clearly distinguishing the present situation from those involved in the *Lemon* and post-*Lemon* cases.

There is even less doubt that the effect of the challenged action is the advancement of the Christian religion as taught and inculcated in the College. Financing of an institution whose curriculum is devoted to Bible study, Christian service, and theology, and which makes mandatory attendance at daily chapel service and regular participation in Christian activities could hardly have any other effect.

Finally, the record clearly establishes the presence of constitutionally forbidden entanglement of church and state.

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7. See, *e.g.*, Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 773 (1973). It has found no such difficulty in respect to other governmental action in aid of religion. See, Epperson v. Arkansas, 393 U.S. 97 (1968) (proscription of evolution); Stone v. Graham, 101 S. Ct. 192 (1980) (posting of Ten Commandments in public schools). See also, McGowan v. Maryland, 366 U.S. 420 at 453 (1961).

8. See Respondents' Brief in Opposition to Petition for Certiorari, pp. 5-7.

9. Federal Property and Administrative Services Act of 1949, 40 U.S.C. Sec. 471 *et seq.* (1970).

The deed to the College requires it to file reports on the operation and maintenance of the property and "such other pertinent data evidencing continuing use of the property for the specific purpose specified in the property application." In *Lemon*, the Court held that the continuing governmental surveillance required to make sure that the statutory beneficiary does not inculcate the doctrines and faith does itself effect impermissible entanglement. 403 U.S. at 619. The present case presents the converse of that situation; it requires continuing surveillance to assure that the granted property *is* used to effect that constitutionally impermissible purpose.[10]

One further comment on the substantive issue is appropriate. In footnote 9 on page 5 of its petition for certiorari, the College states:

> . . . Judge Adams wrote: "The Valley Forge Christian College is admittedly sectarian". The "admission" to which the Court refers is certainly not one of the Petitioners . . . For a college to be "sectarian" or "church-related" is hardly co-extensive with "religion" as used in the Establishment Clause. See Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1970); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

10. The only situation analogous to the present one (*i.e.*, entanglement through governmental action to make sure that the First Amendment *is* violated) that we have been able to find is in the case of Anderson v. Laird, 437 F. 2d 912 (7th Cir.) cert. denied 404 U.S. 865 (1972). There the Court of Appeals held unconstitutional compulsory chapel attendance at government military academies on the ground, *inter alia*, that while the cadets were in church they were subject to continuing surveillance by each other and by superior officers to make sure they were giving sufficient attention to the praying in the church.

The meaning of the footnote is not quite clear; the second and last sentences seem to be contradictory. More important, however, is the fact that the cited cases stand for propositions directly opposite to those here asserted by the Church. *Tilton* and *McNair* held that government financing of buildings constructed in church-related colleges is constitutionally permissible *only* if the building is to be used for exclusively secular purposes; in the present case the buildings are to be used *only for religious purposes.* In *Roemer,* the Court upheld grants to be used for nonsectarian purposes only if the aided colleges were not "pervasively sectarian." Obviously, the exact opposite is the case here.

2. Taxing and Spending

We turn now to the basic question raised in the present status of the litigation, that of standing to sue, and the assumed limitation of jurisdiction to instances involving exercise of the taxing and spending power conferred by Article I, Section 8 of the Constitution. The starting point of consideration is, of course, the decision in *Flast* v. *Cohen.* Emphasis is placed by the Church upon the following sentences:

> Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercise of congressional power under the taxing and spending clause of Art. I, Sec. 8 of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this require-

> ment, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, Sec. 8. 392 U.S. at 102-103.

Initially it should be pointed out that under *Flast* there would be no question of standing had the government granted to the Church the money required to purchase the land and buildings here in issue and the Church thereupon used the same money to effect the purchase; *Flast* v. *Cohen* establishes this. It has also been previously noted herein that Madison's veto message respecting the grant of land to a Baptist church used the terms "parcel of land" and "funds" interchangeably. It is difficult to believe that Madison, who played so active a role in drafting not only the First Amendment but also the Constitution itself, and his colleagues in Congress who approved both, agreed to a device that could be so simply used by a determined Congress and compliant members of the President's cabinet to nullify the constitutional ban on governmental financing of churches and church schools.

We suggest that neither the taxing and spending clause in Article I, Section 8 nor its construction in *Flast* impels such a conclusion. The taxing and spending power, we submit, is implicated in the present case no less than it was in *Flast*. The Church here is exempt from taxation neither more nor less than those operating the parochial schools in *Flast*. The funds sought to be used to finance parochial school operations in *Flast* had originally become part of the national treasury through the same taxing

procedure as the funds used to acquire the realty involved in this case. In both cases assets acquired by the government through taxation of all persons, irrespective of their religion or lack of religion, were turned over to institutions for no reason other than their religious operations.

The transfer of assets to the beneficiary of the challenged legislation in this case was conditioned on their being used to advance religion no less in this case than in *Flast*. Indeed, it is even more so in the present case. In *Flast*, the subject matter taught—arithmetic, reading, geography, etc.—though impregnated with religion through the manner by which they were taught, was basically secular. In the present case only religion, pure and simple, was taught; the titles of the degrees available—Ministerial Program, Missionary Program, Christian Education Program and Bible Concentration Program—testify to this.

It is no answer that the institutional beneficiary in the present case supplies the religious education to post-secondary school students while the plaintiffs in *Flast* challenged the Elementary and Secondary Education Act of 1965. *Tilton* v. *Richardson* and its progeny made it quite clear that tax-raised funds cannot constitutionally be used to finance theological seminaries, which, of course, cater only to college or post-college students.

We suggest further that the District Court was in error in asserting that plaintiffs lack standing in the present suit by reason of Article IV, Sec. 3, Cl. 2 in the Constitution, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting

the territory or other property belonging to the United States." Even if the power to regulate encompasses making a gift of that which is regulated, it obviously does not sanction gifts which, as Madison held, violate the Constitution. Obviously, the Clause cannot be deemed to override the subsequently adopted First Amendment. It is therefore difficult to read into the Clause a ban on suits seeking to enjoin such an unconstitutional act. In any event, it certainly cannot be construed to exclude jurisdiction in respect to a suit which, as we have sought to show, is encompassed within the taxing and spending power.

3. Citizen's Standing

Independent of status as taxpayers, we submit that the court below was correct in holding that the plaintiffs herein have standing to bring the present suit by reason of their status as citizens of the United States. As noted in the Court of Appeals' opinion herein,[11] in *Flast* the plaintiffs in their brief to this Court asserted not only a "pocketbook injury," but also "an injury to the right to live under a government which separates itself from the church and church affairs." The lead pleantiff in that case, Florence Flast, is also one of the amici to the present brief, and, although an officer in each of the organizational amici herein, is also acting in her status not only as a taxpayer but no less as a citizen of the United States.

The amount of monetary damage suffered by her as an individual taxpayer was realistically within the *de minimis* category. Would her standing have been vulnerable had she been below minimum income tax liability? Indeed, a

11. Petition for certiorari, p. 19a fn. 51.

strong argument can be made for the converse of the argument asserted by the Church herein. It is the financially underprivileged who suffer most when public funds are diverted from their basic function of financing public education and are given to religious schools which they cannot enter because of their own religious conscience.

The *de minimis rule*, we suggest, has no application to the restraints imposed by the Establishment Clause, and should not constitute a barrier to a citizen's suit challenging its violation. Ordinarily the monetary loss suffered by a taxpayer as result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress. In respect, however, to matters of religious liberty and separation of church and state, the quantity of the monetary appropriation is without significance. When the government makes any appropriation, no matter how slight, for religious purposes, religion has come within the cognizance of civil government. Madison well recognized this when he warned:

> That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.[12]

It is, we submit, the fact, not the extent, of governmental aid which controls.

In *McCollum* v. *Board of Education of Champaign, Illinois*, 333 U.S. 203 (1948), a suit challenging religious

12. Memorial and Remonstrance Against Religious Assessments, appendix to Justice Rutledge's dissenting opinion in Everson v. Board of Education, 330 U.S. 1 at 65-66 (1947).

instruction in the public schools conducted by unpaid volunteers, the Court rejected a claim, accepted by the Illinois state court, that the expenses incurred by the public school system (wear and tear on furniture, electric current on dark days, etc.) were so slight as to fall within the *de minimis* rule and the courts, including this Court, were without jurisdiction. In *Engel* v. *Vitale*, 370 U.S. 421 (1968) and *Abington School District* v. *Schempp*, 374 U.S. 206 (1963), the Court accepted jurisdiction in suits challenging the constitutionality under the Establishment Clause of prayer recitation and devotional Bible reading in the public schools; and in *Stone* v. *Graham*, 101 S.Ct. 192 (1980), it did the same in respect to suits challenging the posting of the Ten Commandments on the walls of public school classrooms.

In none of these cases was there any expenditure of taxpayers' funds. Indeed, in *Stone* the legislature of Kentucky made a special effort to avoid judicial invalidation by mandating that all expenses for the posting of the Commandments must come from voluntary contributions so that no expenditure of tax-raised funds would be involved. True enough, all of these cases concerned expenditures, or more accurately non-expenditure of state rather than Federal funds so that the taxing and spending provisions of Article I were not directly implicated. Yet, it is difficult to believe that the result in any of these cases would have been different if they had involved the public schools in the District of Columbia rather than Illinois, New York, Pennsylvania or Kentucky.[13]

13. *Cf.* Hurd v. Hodge, 334 U.S. 24 (1948); Bolling v. Sharpe, 347 U.S. 477 (1957).

The crux of the matter and the teaching of these cases is that there is a vital citizens' interest, going beyond that of a taxpayer, in assuring that the government of the United States should not itself be guilty of flagrantly violating the First Amendment to our Constitution. As the court of appeals noted in its opinion (at p. A 27), the challenged gift of government property to a church seriously injures the plaintiffs' individual and personal constitutional right of religious liberty and church-state separation. This right belongs to all citizens, not merely those who are taxpayers, and even as to them it is a right far more precious than the loss of a few dollars as taxpayers.

It is no answer to urge that if the people do not like what Congress is doing, they can elect a new Congress which will be more faithful to the Constitution. The court of appeals was again correct in quoting the statement in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) that fundamental First Amendment rights "depend on the outcome of no election" and are "beyond the reach of majorities." *Ibid.* at 638.

Nor is it an adequate response that if the people do not like a judicial decision, they can change the Constitution through amendment. The Constitution as it now reads is quite clear that the government may not make a gift of public property to a church, and no additional language is needed to rectify any possible ambiguity. The problem does not lie in constitutional language but in Congressmen's readiness, for political reasons, to disregard constitutional limitations. The Court can judicially note the efforts in Congress to bring prayer back into the public

schools by means of statutory limitations on the judicial power to review. It is unrealistic to assume that similar efforts will not be made even if the Constitution were amended to expressly confer judicial jurisdiction in cases such as that now before the Court.

4. National Policy and Constitutional Supremacy

The Constitution is the supreme law of the land, and all officials, Federal and state, executive and legislative swear to uphold it. This is what the pupils in our schools are taught, as they are taught that interpretation of the Constitution is the function of the judiciary. And they are also taught that the Constitution forbids use of tax-raised funds to finance religious schools, and certainly that governmental assets, whether in the form of money or property, may not be turned over as gifts to churches.

Particularly relevant here is the following statement of Justice Brandeis in *Olmstead* v. *United States* (277 U.S. 438 at 485 [1928] [dissent]):

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of law, existence of government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people.

The law forbids what the government has done in the present case, yet having done so the law, it is argued, is impotent to redress the wrong done to the Constitution and the American people. The lesson that inevitably comes

from this is that oath of office or not, the Constitution can be violated if Congress so wills, and the judiciary is helpless. One can hardly expect our school pupils and their parents to come to any conclusion other than that violation of law is perfectly all right if you can get away with it.

The Court in *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), expressed a fear that allowing taxpayers to sue might open the door of federal courts to countless suits "in respect of every other appropriation act and statute whose administrations requires the outlay of public money, and whose validity may be questioned." *Ibid.* at 487. The same argument was urged in *Flast,* but was found insufficient to justify a finding that allowing taxpayers' suits under the Establishment Clause would have the same crippling effect upon the federal judicial system.

Thirteen years of experience under *Flast* establishes that there was no realistic basis for that fear. During that period, the Court found it necessary only once, in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), to adjudicate constitutionality in respect to a federal grant of money. There is, we suggest, no reason to fear that allowing taxpayers or citizens to challenge judicially federal grants in the form of tangible property other than money will have a more deleterious effect upon our judicial system.

In *Wolman* v. *Waters,* 433 U.S. 229 (1977), the Court did not indicate any fear that allowing taxpayers to challenge under the Establishment Clause grants, in any or all of the 50 state, of non-monetary materials (such as teaching equipment, non-returnable books) would impose an intolerable burden upon the federal courts. It is difficult to see

why a remedy should be denied where the grant is made in the District of Columbia. *Hurd* v. *Hodge,* 334 U.S. 24 (1948) and *Bolling* v. *Sharp,* 347 U.S. 477 (1957), impel a contrary determination.

Constitutional supremacy, we respectfully submit, is our national policy, and should not be weakened by sanctioning so flagrant a violation as is manifest in the present case.

Conclusion

For the reasons stated, the decision of the Court of Appeals should be affirmed.[14]

Respectfully submitted,

/s/ Leo Pfeffer

Leo Pfeffer
Attorney for Amici Curiae

14. There is no need for the Court at this stage of the proceedings to adjudge what effect a decision of affirmance should have in respect to governmental grants of property made before the present suit was instituted. Resolution of possibly conflicting equities should await a determination of the merits.